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No. 96-1242

In the Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, ET AL., PETITIONERS

v.

EXECUTIVE OFFICE OF THE PRESIDENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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35 pp

QUESTION PRESENTED

Whether the National Security Council is an "agency" within the meaning of the Freedom of Information Act and the Federal Records Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A51) is reported at 90 F.3d 553. The opinion and order of the district court (Pet. App. A52-A88) are reported at 877 F. Supp. 690. Earlier opinions of the court of appeals in this case are reported at 1 F.3d 1274 and 924 F.2d 282. Earlier opinions of the district court are reported at 810 F. Supp. 335 and 721 F. Supp. 343.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on November 6, 1996. Pet. App. A106-A107. The petition for a writ of certiorari was filed on February 4, 1997. The jurisdiction of this Court is invoked under

28 U.S.C. 1257, but the proper basis is 28 U.S.C. 1254(1).

STATEMENT

1. *The Records Statutes.* a. Official government records are subject to one of two records schemes: the Federal Records Act (FRA), 44 U.S.C. Chs. 21, 29, 31, and 33; or the Presidential Records Act of 1978 (PRA), 44 U.S.C. 2201 *et seq.* Records of "Federal agencies"—often referred to as "federal records"—are governed by the FRA. The term "Federal agency" includes "executive agenc[ies]," which in turn include "any executive department or independent establishment in the executive branch of the Government." 40 U.S.C. 472(a); see 44 U.S.C. 2901(13) and (14). Records of federal "agencies" are also subject to the disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. 552.

"Presidential records" are governed by the PRA. The PRA defines "Presidential records" to include

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. 2201(2). The term "Presidential records" does not include "official records of an agency." 44 U.S.C. 2201(2)(B). This Court has made clear that the term "agency," as it appears in the relevant statutes, does not include "the President's immediate personal

staff or units in the Executive Office [of the President (EOP)] whose sole function is to advise and assist the President." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974)).[1]

Thus, "[t]he FRA defines a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials." *Armstrong* v. *Executive Office of the*

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[1] The PRA incorporates the FOIA's definition of "agency" contained in 5 U.S.C. 552(f). See 44 U.S.C. 2201(2)(B). In *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), the court of appeals construed the Administrative Procedure Act (APA) definition of "agency" (see 5 U.S.C. 551(1)) to include "any administrative unit with substantial independent authority in the exercise of specific functions." The court indicated, however, that, "[i]f [an entity's] sole function were to advise and assist the President, that might be taken as an indication that the [entity] is part of the President's staff and not a separate agency." 448 F.2d at 1075.

In 1974, Congress amended the FOIA definition so that it expressly covered any "establishment" in "the Executive Office of the President." Act of Nov. 21, 1974, Pub. L. No. 93-502, § 3, 88 Stat. 1564 (codified at 5 U.S.C. 552(f)). The Conference Report accompanying the 1974 amendments endorsed the *Soucie* analysis and stated that "[t]he term [Executive Office of the President] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974). This Court in *Kissinger* adopted that approach. 445 U.S. at 156. The *Soucie* standard has been incorporated into the PRA, which defines "Presidential records" to include materials "created or received by * * * a unit or individual of the Executive Office of the President whose function is to advise and assist the President." 44 U.S.C. 2201(2).

President, 1 F.3d 1274, 1293 (D.C. Cir. 1993) (*Armstrong II*). The determination of which statutory scheme applies to a given EOP component turns on whether that entity is an "agency" within the meaning of the relevant statutes. The answer to that question depends, in turn, on whether the entity performs functions other than advising and assisting the President.

b. The FRA provides for the creation, preservation, and disposition of federal records under guidance provided by the Archivist of the United States. 44 U.S.C. 2904. The FRA places "particular emphasis on the prevention of unnecessary Federal paperwork." 44 U.S.C. 2902(6). The Act is intended to "[c]ontrol * * * the quantity and quality of records produced by the Federal Government," in order "to prevent the creation of unnecessary records" and to "[s]implif[y] * * * [the] processes of records creation." 44 U.S.C. 2902(2), (3) and (4); see S. Rep. No. 1326, 94th Cong., 2d Sess. 2 (1976). The FRA also strives for accurate and complete documentation of the policies and transactions of the government, and the "[j]udicious preservation and disposal of records." 44 U.S.C. 2902(5).

"To achieve those ends, the FRA burdens the heads of federal agencies with several obligations." *Armstrong II*, 1 F.3d at 1278. The agency head is required to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." 44 U.S.C. 3101. He must "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," and the program must satisfy specified requirements. 44 U.S.C. 3102. The

agency head must obtain the approval of the Archivist before disposing of records. 44 U.S.C. 3303, 3303a; see 44 U.S.C. 3314 ("records of the United States Government may not be alienated or destroyed except under this chapter"). The Archivist is required, in turn, to "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposal," 44 U.S.C. 2904(a); to "promulgate standards, procedures, and guidelines with respect to records management," 44 U.S.C. 2904(c)(1); and to perform other duties with respect to the implementation and enforcement of the FRA. See *Armstrong II*, 1 F.3d at 1279.

c. The PRA, effective in 1981, ended the tradition of private ownership of official presidential papers. The PRA requires the President to determine what materials qualify as "Presidential records" and to implement records management controls to assure the adequate documentation of the performance of his duties. 44 U.S.C. 2203(a); see also H.R. Rep. No. 1487, 95th Cong., 2d Sess., Pt. I, at 4 (1978). To avoid excessive retention of documents, the President may dispose of presidential records in his possession that no longer have "administrative, historical, informational, or evidentiary value," after obtaining the Archivist's views concerning the proposed disposal. 44 U.S.C. 2203(c) and (d). If the Archivist believes that the proposed destruction raises issues of interest to Congress or the public, the President must notify the appropriate committees of Congress of the intended destruction and provide copies of the disposition schedule. *Ibid.*

At the end of the President's service in office, the Archivist assumes custody and control of his presidential records and subsequently determines disposition of and public access to the records pursuant to the PRA, in conjunction with the FOIA. 44 U.S.C. 2203(f), 2204. Access to presidential records is generally delayed until the Archivist has processed them or five years after the end of the President's service in office, whichever is earlier. 44 U.S.C. 2203(f)(1), 2204(b)(2). The PRA permits the President to restrict access to certain categories of records for up to 12 years. 44 U.S.C. 2204(a). The Archivist's determination whether materials fall within those restrictions is subject to judicial review only upon an action initiated by the former President, if he believes that the determination violates any of his rights or privileges. 44 U.S.C. 2204(b)(3).

As the D.C. Circuit explained in a prior appeal in this case:

> The statutory scheme and legislative history of the PRA reflect a congressional intent to balance two competing goals. First, Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office. But Congress was also keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations. Congress therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over

presidential records during the President's term in office.

Congress balanced these competing goals by requiring the President to maintain records documenting the policies, activities, and decisions of his administration, but leaving the implementation of such a requirement in the President's hands. For example, although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist the agencies in the development of a records management system, the PRA lacks an analogous provision. The Archivist also lacks the authority under the PRA to inspect the President's records or survey the President's records management practices. Finally, the PRA does not require the Archivist to provide Congress with the annual reports on the President's record-keeping policies and practices that he must submit for agencies.

Moreover, the PRA accords the President virtually complete control over his records during his term of office. Although the President must notify the Archivist before disposing of records and the Archivist may inform Congress of the President's desire to dispose of the records, neither the Archivist nor the Congress has the authority to veto the President's disposal decision.

Armstrong v. *Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (*Armstrong I*) (citations omitted).

2. *The National Security Council.* The National Security Council (NSC or Council) was created by the National Security Act of 1947, ch. 343, § 101, 61 Stat. 496 (codified at 50 U.S.C. 402). By statute, the Council includes the President, the Vice-President,

and the Secretaries of State and Defense. See 50 U.S.C. 402(a)(1)-(4); Pet. App. A93. "Other high-ranking officials may be designated by the President as Council members, or to attend Council meetings." Pet. App. A93; see 50 U.S.C. 402(a)(7). The Act provides that "[t]he President of the United States shall preside over meetings of the Council." 50 U.S.C. 402(a). In addition, "[t]he Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President," without the advice and consent of the Senate. 50 U.S.C. 402(c).

The Council's function is

> to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security.

50 U.S.C. 402(a). "[S]ubject to the direction of the President," the Council is also required

> (1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and
>
> (2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.

50 U.S.C. 402(b). The Council is also authorized to perform "such other functions as the President may direct." *Ibid.*

The NSC historically has treated most of its records as presidential records. IV C.A. App. 985. Most of those records have been transferred to the Presidential Library of the outgoing President upon the completion of his term in office, either as donated historical materials of the President or pursuant to the PRA since it became effective in 1981. See *ibid.*; V C.A. App. 1296 (¶ 4), 1312. Each Administration also has left behind some records for the purpose of promoting continuity in national security policy. See IV C.A. App. 985. Those records, previously described as NSC "institutional" files (*ibid.*; see V C.A. App. 1381 (No. 94)), were disposed of in accordance with the FRA. IV C.A. App. 985; V C.A. App. 1296 (¶ 4). Since 1975, the Council's practice has been to search those institutional files in response to FOIA requests. IV C.A. App. 985.

3. *Prior Proceedings.* a. On January 19, 1989—the last day of the second Reagan Administration—petitioners filed a FOIA request for EOP and NSC records generated on the electronic mail system since its installation in 1985. See *Armstrong I*, 924 F.2d at 286. Petitioners also filed suit in federal district court, seeking a declaration that many of the electronic documents were federal or presidential records, and an injunction against their unlawful destruction. See *id.* at 286-287. The government agreed to maintain all Reagan-era information on backup tapes pending the disposition of the suit. *Id.* at 287.

The district court denied the government's motion to dismiss and for summary judgment. *Armstrong* v. *Bush*, 721 F. Supp. 343 (D.D.C. 1989). The court

agreed with the government that neither the FRA nor the PRA provided a private right of action. *Id.* at 348-349. The court held, however, that the implementation of the two statutes by the President and subordinate executive branch officials was subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* 721 F. Supp. at 349-350. The court subsequently certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). See *Armstrong I*, 924 F.2d at 284.

b. The court of appeals affirmed in part, reversed in part, and remanded. *Armstrong I.* The court first held that the President's implementation of the PRA was not reviewable, both because the President is not an "agency" within the meaning of the APA,[2] and because the PRA impliedly precludes judicial review. 924 F.2d at 288-291. The court held, however, that petitioners' claims under the FRA were judicially cognizable under the APA. *Id.* at 291-294, 297. In the view of the court of appeals, "neither the statutory scheme nor the legislative history evinces a congressional intent to preclude judicial review of the adequacy of the NSC's recordkeeping guidelines and directives." *Id.* at 292. Because the court of appeals viewed the then-existing record as "inadequate to determine the reasonableness of the guidelines," the court remanded for further proceedings. *Id.* at 296.

c. On remand, the district court held that the EOP recordkeeping guidance, which directed EOP personnel to print out electronic mail messages that

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[2] Subsequent to the court of appeals' decision in *Armstrong I*, this Court agreed that the President is not an "agency" within the meaning of the APA. *Franklin* v. *Massachusetts*, 505 U.S. 788, 796 (1992).

were appropriate for preservation, was arbitrary and capricious because the printed copies did not capture all of the information associated with the messages that the district court deemed pertinent. *Armstrong* v. *Executive Office of the President*, 810 F. Supp. 335, 341-342 (D.D.C. 1993). However, the court rejected petitioners' contention that "the NSC's record keeping guidance is contrary to law because it instructs the staff to save certain material as presidential records when, in fact, they are federal records." *Id.* at 347. The court construed the language of the PRA, and the court of appeals' opinion in *Armstrong I*, as "demonstrat[ing] that the NSC is entitled to segregate presidential and federal records." *Ibid.* The district court declined to review the NSC's recordkeeping guidance with respect to presidential records, construing the decision in *Armstrong I* to hold that, insofar as the NSC created and maintained presidential records, review was precluded. *Id.* at 347-348.

d. The court of appeals affirmed in part and reversed and remanded in part. *Armstrong II*. The court affirmed the district court's holding that the EOP and NSC recordkeeping guidelines were inconsistent with the FRA. 1 F.3d at 1282-1287. The court rejected the government's contention that preservation of paper records of electronic mail messages was sufficient to comply with the Act. The court reasoned that, "since there are often fundamental and meaningful differences in content between the paper and electronic versions of these documents, the electronic versions do not lose their status as records and must be managed and preserved in accordance with the FRA." *Id.* at 1287.

The court also considered petitioners' contention that the EOP recordkeeping guidelines "improperly instruct NSC * * * staff to treat as presidential records materials that are, in fact, agency records subject to the FRA." 1 F.3d at 1290. The court held that those guidelines were subject to judicial review. *Id.* at 1290-1294.[3] The court concluded, however, that it could not adequately assess the guidelines on the existing record. *Id.* at 1296. The court noted in that regard that "[t]he NSC appears to have routinely conceded its status as an 'agency' subject to the FOIA in litigation regarding specific FOIA requests," but that "the issue has never been definitively resolved." *Ibid.* The court remanded the case to the district court for further proceedings.

e. After the court of appeals' decision in *Armstrong II*, the NSC reexamined its own status.[4] The

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[3] The court explained that, "although the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office, the courts may review guidelines outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records." 1 F.3d at 1294 (citation omitted).

[4] The Department of Justice's Office of Legal Counsel (OLC) also examined the issue and concluded that the NSC is not an "agency" subject to the FOIA. See Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser, National Security Council, Re: Status of NSC as an "Agency" under FOIA (OLC Sept. 20, 1993). A prior OLC opinion that had reached the opposite conclusion was withdrawn. See *id.* at 8 (withdrawing Memorandum of John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert J. Lipshutz, Counsel for the President, 2 Op. O.L.C. 197 (1978)). A still earlier OLC opinion had concluded that the

Council's ultimate conclusion was that, "[t]aking into account the historical and current functions and purposes of the NSC, the NSC is an entity within the Executive Office of the President that exists solely to advise and assist the President in the discharge of his constitutionally based responsibilities over the national security affairs of the United States." Pet. App. A94. The NSC concluded on that basis that it was not an "agency" within the meaning of the relevant statutes. *Ibid.* The President instructed the NSC, however, to institute a voluntary disclosure policy for appropriate NSC records. *Id.* at A89-A90.

f. On remand from the court of appeals' decision in *Armstrong II*, the district court rejected the government's argument and held that the NSC is an "agency" subject to the FRA and the FOIA. Pet. App. A52-A88. The court determined that in several respects the Council exercises authority to act independently of the President. *Id.* at A72-A76. The court therefore concluded that, "to the extent the NSC's current guidelines allow all of its records to be classified as 'Presidential' records, the guidelines are contrary to law." *Id.* at A85.

g. The court of appeals reversed. Pet. App. A1-A51 (*Armstrong III*). The court concluded that "neither the statutory Council nor the NSC staff performs significant non-advisory functions," *id.* at A7, and that the Council therefore is not an "agency" subject to the requirements of the FRA and the FOIA.

NSC was not a FOIA agency. See Memorandum of Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, to John W. Dean, III, Counsel to the President, at 16-18 (OLC Jan. 30, 1973) (IV C.A. App. 1003-1005).

The court of appeals acknowledged that "the NSC has a structure sufficiently self-contained that the entity could exercise substantial independent authority." Pet. App. A11. The court concluded, however, that the Council does not in fact exercise such authority. The court emphasized the President's status as chair of the Council, and the National Security Advisor's control over NSC staff, as factors suggesting that the NSC lacks substantial independent authority. *Id.* at A12. The court examined the statutory provisions defining the NSC's role and concluded that Congress had not authorized the Council to perform any non-advisory function. *Ibid.* The court specifically rejected petitioners' contention that the National Security Act of 1947 places NSC staff, as opposed to the Council headed by the President, in direct control of the Central Intelligence Agency. *Id.* at A12-A13.

The court of appeals then addressed petitioners' contention that various Presidents, during the 40 years since the NSC's creation, had delegated substantial independent authority to the Council. See Pet. App. A14. The court examined each of the areas in question. See *id.* at A14-A21. The court determined that

> [i]nsofar as the staff has been delegated authority to make policy recommendations for approval by the President, his NSA, or the statutory Council, the staff's functions are, of course, quintessentially advisory. Likewise, to the extent that the NSC assists the President in coordinating the activities of the various agencies with national security responsibilities, it exercises no authority of its own.

Id. at A14. The court concluded that "[u]nder none of these [delegations] * * * does the NSC appear to exercise any significant non-advisory function." *Id.* at A21. The court also held that the NSC's prior conduct in maintaining institutional records separate from presidential records, and in making some of the institutional records subject to public access requests, was not dispositive of the Council's status as an "agency." *Id.* at A23.

Judge Tatel dissented. Pet. App. A25-A51. In his view, "the record indicates that responsibilities delegated to the NSC are in fact carried out without the personal involvement of the President." *Id.* at A28.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. This case involves the application of established legal principles to a single component within the Executive Office of the President (EOP). The court of appeals emphasized the unique structure of the NSC as the only unit in the EOP that includes the President himself. The court also carefully considered the responsibilities of the NSC and concluded that the Council is not authorized to perform any significant non-advisory functions. The court of appeals' decision turns on the distinctive characteristics of the NSC, and it raises no issue of general importance warranting this Court's review.

1. Petitioners first contend (Pet. 17-24) that the court of appeals' decision warrants review because it has broad implications for other units within the EOP. That argument rests on a misreading of the court's opinion.

a. In *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), the court of appeals stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." The court in *Soucie* considered the status of the Office of Science and Technology (OST), a unit in the EOP. In concluding that the OST was an agency, the Court stated that, "[i]f the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." *Id.* at 1075.

The OST did more than advise and assist the President, the court held, because it evaluated federal science programs—a duty that *Congress* had imposed on OST's predecessor, the National Science Foundation. 448 F.2d at 1075. The court emphasized that Congress "was delegating some of its own broad power of inquiry" in order to improve the information "available to the legislature" on scientific programs. *Ibid.* Both Congress and the Executive Branch "contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President." *Ibid.* "By virtue of its independent function of evaluating federal programs," the court held, "the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." *Ibid.*

The Conference Report accompanying the 1974 amendments to the FOIA endorsed the *Soucie* analysis and stated that "[t]he term [Executive Office of the President] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise

and assist the President." H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974). This Court in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), adopted that approach. The PRA, moreover, incorporates the *Soucie* test in the text of the Act, by defining "Presidential records" to include materials "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President." 44 U.S.C. 2201(2).

b. Petitioners do not challenge the validity of the *Soucie* test itself. They contend, however, that the court of appeals in this case applied that test in such a manner as to "potentially exempt any EOP unit from the records laws." Pet. 18. That argument is without merit.

In determining that the NSC is not an "agency" under the *Soucie* analysis, the court of appeals did not rely on attributes of the Council that are characteristic of EOP units generally. Rather, the court placed primary emphasis upon the fact that the President serves on and presides over the Council. See, *e.g.*, Pet. App. A12 (noting that "[t]he President chairs the statutory Council, and his National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff"); *id.* at A12-A13 (observing that "the statute delegates authority not to the institutional NSC but to the President and the statutory Council headed by the President"); *id.* at A20 (noting "the essential identity between the statutory Council and the President—an identity distinctive to the NSC and completely without parallel at the OST"); *id.* at A21 (noting "the overwhelming fact that the President is the head of the NSC"). The NSC is unique among

EOP components in that the President is identified by statute as a member and its head.[5] There is consequently no basis for petitioners' suggestion (see Pet. 21, 23) that the court of appeals' decision casts doubt upon the status of EOP units that have previously been determined to be "agencies."[6]

Although the court of appeals placed primary emphasis on the President's status as a member and the head of the Council, the court did not deem that factor dispositive. The court stated that, in light of the close proximity of the Council to the President, petitioners "must make a strong showing * * * regarding the" nature of the NSC's delegated authority. Pet. App. A12. It proceeded to examine in an exhaustive fashion the functions that the Council

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[5] Petitioners suggest (Pet. 23) that the Office of Administration (OA), a component of the EOP, is also headed by the President. That suggestion is incorrect. By Executive Order No. 12,122, 44 Fed. Reg. 11,197 (1979), the President has effected a broad delegation of authority over the OA to its Director. That Executive Order states that, "[s]ubject to such direction or approval as the President may provide or require, the Director shall organize the Office of Administration, contract for supplies and services, and do all other things that the President, as head of the Office of Administration, might do." *Ibid.* The OA's governing regulations state that the OA "consists of" specified offices, which do not include the President. 5 C.F.R. 2502.3(a).

[6] Petitioners thus miss the point in challenging the court of appeals' analysis on the ground that "[a]ll EOP units have proximity to the President." Pet. 19. The court of appeals made clear that the NSC is "proximate" to the President to a degree unique among EOP components because the President sits on and heads the Council. The court did not suggest that the degree of proximity to the President that is characteristic of EOP units generally is itself a basis for concluding that a particular entity is not an "agency."

performs, see *id.* at A12-A21, and concluded that petitioners "ha[d] not carried [their] burden of showing that the NSC exercises meaningful non-advisory authority," *id.* at A21.[7]

Thus, the court of appeals did not base its holding on any broad categorical rule applicable to the EOP generally. It focused instead on the distinctive characteristics of the NSC, both with respect to the Council's unique proximity to the President and with respect to the narrow parameters of its delegated authority. The court of appeals' approach in this case is in accord with its consistent practice of examining each unit within the EOP and determining, on the basis of that unit's characteristics, whether it is or is not an "agency."[8] The court's determination that the

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[7] There is no basis for petitioners' statement (Pet. 18) that the court of appeals "insisted that an EOP entity is an agency only if it has the authority to act contrary to the President's wishes." In determining whether the NSC possessed substantial authority to act "independently of the President," Pet. App. A20, or "without the consent of the President," *id.* at A17, the court of appeals focused on the extent of the Council's power to select from among alternative courses of action *without the benefit of express presidential direction.* The court observed, for example, that "[t]he question is not only whether the President sets the goal, but the generality of that goal; the more general the goal the greater the likelihood that the responsible entity is vested with some element of discretion and is not just advising or assisting the President." *Id.* at A20. See also *id.* at A9-A10 ("It is not the number of functions delegated to the NSC, but the degree of the NSC's independence in discharging them, that matters."). Obviously no EOP entity has authority to disregard a presidential directive, and the court of appeals did not suggest that such authority is a prerequisite to agency status.

[8] See *Sweetland* v. *Walters*, 60 F.3d 852, 853-855 (D.C. Cir. 1995) (staff of Executive Residence is not an agency); *Meyer* v.

NSC is not an agency can therefore be expected to have little impact on the status of other EOP units.

2. Petitioners also contend (Pet. 25-28) that the question whether the NSC is an agency is itself sufficiently important to warrant review by this Court, independent of any potential impact on other EOP units. That argument is unpersuasive.

a. The decision of the court of appeals is correct. As the court of appeals observed, "[t]he President chairs the statutory Council, and his National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff." Pet. App. A12. This Court, emphasizing its "respect for the separation of powers and the unique constitutional position of the President," has held that the President is not an "agency" subject to the APA. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992). The Court has also recognized that the National Security Advisor is not an "agency" for purposes of the FOIA. *Kissinger*, 445 U.S. at 156. Absent very persuasive evidence that the Council exercises substantial independent functions, it would therefore be anomalous to conclude that the NSC is

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Bush, 981 F.2d 1288, 1294-1298 (D.C. Cir. 1993) (task force on regulatory relief is not an agency); *National Security Archive* v. *Archivist*, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel's Office is not a FOIA agency); *Rushforth* v. *Council of Economic Advisers*, 762 F.2d 1038, 1040-1043 (D.C. Cir. 1985) (Council of Economic Advisers is not an agency); *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (Council on Environmental Quality is an agency); *Sierra Club* v. *Andrus*, 581 F.2d 895, 901-902 (D.C. Cir. 1978) (Office of Management and Budget is an agency), rev'd on other grounds, 442 U.S. 347 (1979); *Soucie*, *supra* (Office of Science and Technology is an agency).

itself an "agency." See Pet. App. A12 ("The intimate organizational and operating relationship between the President and the NSC is * * * entitled to significantly greater weight in evaluating the NSC's arguable status as an agency than is the self-contained structure of the entity.").[9]

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[9] Contrary to petitioners' contention (Pet. 25), the court of appeals' decision in this case is not "inconsistent with this Court's ruling in *Kissinger*." The *Kissinger* opinion includes the following discussion:

> The * * * requesters have argued that since some of the telephone notes made while Kissinger was adviser to the President may have related to the National Security Council they may have been National Security Council records and therefore subject to the [FOIA]. See H.R. Rep. No. 93-876, p. 8 (1974), Source Book II, p. 128, indicating that the National Security Council is an executive agency to which the FOIA applies.

445 U.S. at 156. The passage following the citation to the House Report (quoted by petitioners, see Pet. 25) is clearly a description of the House Report, not an expression of the Court's own conclusion. Because the Court in *Kissinger* concluded that the materials at issue were not properly characterized as NSC records, a determination whether the NSC was in fact an "agency" was ultimately unnecessary to its resolution of the case. See 445 U.S. at 156.

Nor is the House Report itself persuasive authority with respect to the NSC's status. That Report stated:

> The term "establishment in the Executive Office of the President," as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

Plainly aware of separation of powers concerns, Congress did not confer any independent authority upon the Council. Under 50 U.S.C. 402, the NSC's functions are (i) to *advise* the President with respect to the integration of domestic, foreign, and military policies; (ii) to *coordinate* the policies and functions of the departments and agencies; (iii) to *assess and appraise* the objectives, commitments, and risks of the United States; (iv) to *consider* policies on matters of common interest to the national security departments and agencies; and (v) to *make recommendations* to the President. 50 U.S.C. 402(a), (b) and (d) (emphasis added). Those functions plainly fall within the ambit of advising and assisting the President. The legislative history of the 1947 Act confirms that the NSC is "an advisory body to the President with respect to the integration of domestic, foreign, and military policies." S. Rep. No. 239, 80th Cong., 1st Sess. 10 (1947). In particular, Congress accepted the recommendation of President Truman's advisers in the Bureau of the Budget that the Council not be "delegated authority which only the President can

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H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974). That catalogue reflects no analysis of the NSC's distinctive characteristics, or of the proper application of the "sole function" test. Indeed, the Council of Economic Advisers (CEA)—one of the EOP units listed in the House Report—has subsequently been held not to be a FOIA agency. See *Rushforth*, 762 F.2d at 1040 (explaining that "[w]here, as here, the specific mention of the CEA in the House Report was dropped and a specific, judicially formulated test [the *Soucie* test] was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect"); *id.* at 1040-1043 (holding that the CEA is not a FOIA agency).

delegate since in the American constitutional system only the President is responsible for the ultimate formulation of foreign and military policy." IV C.A. App. 1183.[10]

In the court of appeals, petitioners' principal argument was that a series of presidential delegations had conferred substantial independent authority upon the NSC. See Pet. App. A13-A14, A21. The court of appeals examined those delegations at length. *Id.* at A14-A21. It correctly determined that

> [i]nsofar as the staff has been delegated authority to make policy recommendations for approval by the President, his NSA, or the statutory Council, the staff's functions are, of course, quintessentially advisory. Likewise, to the extent that the NSC assists the President in coordinating the activities of the various agencies with national security responsibilities, it exercises no authority of its own.

Id. at A14. "Under none of these" delegations, the court concluded, "does the NSC appear to exercise any significant non-advisory function." *Id.* at A21. Petitioners offer no basis for this Court to revisit that determination.

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[10] President Truman subsequently stated: "Even when the president sits as chairman in a meeting of the National Security Council and indicates agreement, nothing is final until the Council formally submits a document to the President. The document states that the Council met and recommended such-and-such an action, 'which met with your approval.' When the president signs this document, the recommendation then becomes a part of the policy of the government." 2 Harry S. Truman, *Memories: Years of Trial and Hope* 59-60 (1956).

b. Suits under the FOIA may be brought "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia." 5 U.S.C. 552(a)(4)(B). Because the question presented in this case may arise in the context of the Council's withholding of records requested under the FOIA, there remains the possibility of an eventual circuit conflict if a FOIA case is brought in another circuit and the court of appeals for that circuit declines to follow the D.C. Circuit's ruling in this case. In these circumstances, there is no overriding exigency that would justify this Court's review in the absence of a conflict in authority.[11]

c. Petitioners greatly overstate the practical implications of the court of appeals' ruling. Contrary to petitioners' contention, the court's decision does not "exempt[] the NSC from the records preservation and disclosure laws." Pet. 27. The Council remains subject to the requirements of the PRA, including the provisions mandating eventual release to the public of

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[11] Petitioners argue that, "[i]n the past, this Court, recognizing the District of Columbia Circuit's preeminent role in administrative law, has reviewed the Circuit's important decisions on FOIA issues despite the absence of a conflict." Pet. 24 (citing *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136 (1989); *Kissinger*, *supra*). In both of those cases, however, the D.C. Circuit ordered the production of records requested under the FOIA. See *Tax Analysts*, 492 U.S. at 141; *Kissinger*, 445 U.S. at 145-146. Because suits under the FOIA may always be brought in the District of Columbia, see 5 U.S.C. 552(a)(4)(B), a D.C. Circuit decision favorable to the requester will have the practical effect of establishing a nationwide rule. The court of appeals' decision in this case, by contrast, will not preclude private plaintiffs from raising the issue presented in other courts of appeals.

presidential records following the completion of the President's service in office.[12] Consistent with separation of powers principles, Congress, in enacting the PRA, sought "to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office." *Armstrong I*, 924 F.2d at 290. But the court's determination that the NSC is not an "agency" does not mean that the Council's disposition of its records is legally unconstrained. Rather, the court's decision simply means that the preservation and disposition of NSC records will be governed by the statutory regime specifically designed for governmental units whose function is to "advise and assist the President." 44 U.S.C. 2201(2).[13]

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[12] Indeed, even prior to the court of appeals' decision, the bulk of the NSC's records were treated as presidential records subject to the PRA, rather than agency records subject to the FRA. See page 9, *supra*. The decision below therefore does not work a significant change in the way in which NSC records generally have been handled as a practical matter.

[13] Contrary to petitioners' contentions (Pet. 16, 26), there is no legitimate issue of destruction of records in this case. The NSC has always preserved its records, as the multitude of documents in the presidential libraries and the NSC's institutional files attest. The original dispute in this case concerned the treatment of electronic mail by units in the EOP—specifically whether the instruction to print messages that contained record information complied with the records laws. The use of electronic communications was then new to the government, and the instruction was (and remains) reasonable, at a time when most government records are maintained in paper form. In light of the court of appeals' ruling in *Armstrong II*, the Archivist has issued more comprehensive guidance to all agencies concerning how electronic mail should be handled for records preservation and disposition purposes. See

3. Finally, we believe (contrary to the court of appeals' holding in *Armstrong I*) that the APA does not provide for judicial review of a claim that a federal agency's recordkeeping practices are inconsistent with the FRA. That alternative ground for affirmance of the court of appeals' rejection of petitioners' claims under the FRA provides an additional reason for this Court to deny review.

a. Petitioners may not invoke the APA's judicial review provisions because they do not fall within the "zone of interests" protected by the FRA. To obtain APA review of administrative action, a plaintiff must show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); see *Bennett* v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 20.

Congress enacted the FRA's records management provisions not to benefit private parties, but to enhance the efficiency of the federal government. The FRA is a carefully crafted scheme that seeks "to ensure that a balance is struck between developing efficient and effective records management, and the substantive need for Federal records." S. Rep. No. 1326, 94th Cong., 2d Sess. 2 (1976). It reflects Congress's recognition that "[t]he measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization." S. Rep.

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36 C.F.R. 1234.24, as amended by 60 Fed. Reg. 44,634, 44,641 (1995). The recordkeeping guidance issued by the NSC and other EOP entities in 1994 (see 877 F. Supp. at 715) is consistent with the Archivist's guidance.

No. 2140, 81st Cong., 2d Sess. 4 (1950). As this Court observed in *Kissinger*, the FRA was designed "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." 445 U.S. at 149.[14]

b. Review under the APA is also unavailable because a legislative intent to preclude judicial review is "fairly discernible in the statutory scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984); see 5 U.S.C. 701(a)(1). The FRA provides for judicial enforcement only through actions brought by the Attorney General to prevent or redress the "unlawful removal, defacing, alteration, or destruction of records." 44 U.S.C. 2905(a), 3106. Alleged violations of records creation and management duties, by contrast, are subject to the Archivist's limited authority to "make recommendations" for the correction of vio-

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[14] Relying upon its previous decision in *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 53 (D.C. Cir. 1983), the court of appeals in *Armstrong I* held that researchers and historians who make extensive use of government documents fall within the zone of interests of the FRA, thereby enabling them to challenge agency guidelines and directives defining what constitutes a "record." 924 F.2d at 288. That holding is incorrect. First, the court in *American Friends* improperly second-guessed this Court's holding in *Kissinger* that Congress designed the FRA solely to benefit the government. See 720 F.2d at 53. In addition, the *American Friends* court relied heavily upon a provision in the FRA requiring an agency to make and preserve records "designed to furnish the information necessary to protect the legal and financial rights of * * * persons directly affected by the agency's activities." 44 U.S.C. 3101; see 720 F.2d at 54. That Section has no application here, since petitioners have not alleged that they are "directly affected" by the NSC's activities.

lations, and to "submit a written report of the matter to the President and the Congress." 44 U.S.C. 2115(b).

"[T]he presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Community Nutrition Inst.*, 467 U.S. at 349. Consideration of the FRA's structure and history makes clear that Congress eschewed private lawsuits and instead "opted in favor of a system of administrative standards and enforcement." *Kissinger*, 445 U.S. at 149. Indeed, when faced with complaints that the administrative enforcement scheme was ineffective, Congress responded not by allowing for private lawsuits, but by strengthening the administrative process to allow the Archivist independently to initiate an action through the Attorney General. See H.R. Conf. Rep. No. 1124, 98th Cong., 2d Sess. 28 (1984). Allowing direct judicial intrusion into the records management process would significantly alter the scheme created by Congress, create undue delay, and disrupt agency functioning.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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